

TRANSCRIPT OF RECORD U.S.

Supreme Court of the United States

OCTOBER TERM, 1955

No. 380

**EDWIN B. COVEY, COMMITTEE OF THE PERSON
AND PROPERTY OF NORA BRAINARD, AN IN-
COMPETENT, APPELLANT,**

vs.

TOWN OF SOMERS

**ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
NEW YORK**

FILED SEPTEMBER 8, 1955.

JURISDICTION NOTED NOVEMBER 7, 1955.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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EDWIN B. COVEY, COMMITTEE OF THE PERSON
AND PROPERTY OF NORA BRAINARD, AN IN-
COMPETENT; APPELLANT,

vs.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
NEW YORK

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[fol. 1]

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Foreclosure of Tax Liens, pursuant to Article Seven A, Title Three, of the Tax Law, by the TOWN OF SOMERS, Respondent-Respondent.

EDWIN B. COVEY, Committee of the person and property of Nora Brainard, an incompetent, Petitioner-Appellant

STATEMENT UNDER THE RULE

Petitioner, Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, appeals, pursuant to leave granted by an order of the Appellate Division, Second Department, made and entered in the office of the Clerk of said Court on June 1, 1954, certifying a question of law, from an order of the said Court made and entered on the 12th day of April, 1954, one Justice dissenting, affirming an order made and entered in the office of the County Clerk of Westchester County on the 16th day of December, 1953, denying his motion to open default and vacate the judgment of foreclosure, set aside deed and permit him to appear.

Petitioner appeared by King & Tumminelli, as his attorneys and now appears by Adolph I. King.

Respondent is represented by Stanley E. Anderson.

There has been no change of parties or attorneys since the commencement of the within proceeding, except as above set forth.

[fol. 2] IN COUNTY COURT OF WESTCHESTER COUNTY

NOTICE OF APPEAL TO APPELLATE DIVISION—December 23, 1953

In the Matter of the Foreclosure of Tax Liens, pursuant to Article Seven A, Title Three, of the Tax Law, by the TOWN OF SOMERS, List of Delinquent Taxes for 1952

Sir:

Please take notice that the petitioner-appellant, the Committee of Nora Brainard, an incompetent, appeals to the

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Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, from the final order herein, dated December 2nd, 1953, and entered in the Office of the County Clerk of Westchester County on December 16th, 1953, said order denying the application to open the default and vacate the judgment of foreclosure, and set aside the deed, and to permit the Committee of the said incompetent to appear in the above entitled in rem proceeding, and the petitioner-appellant appeals from each and every part of said Order.

Dated, New York, N. Y., December 23, 1953.

Yours, etc., King & Trumminelli, Attorneys for Petitioner-Appellant, Office & P. O. Address, 111 Broadway, Borough of Manhattan, City of New York.

To: Stanley E. Anderson, Esq., Attorney for Respondent Office & P. O. Address, 15 E. Main Street, Mt. Kisco, New York.

[fol. 3] IN COUNTY COURT OF WESTCHESTER COUNTY

ORDER APPEALED FROM—December 16, 1953

A motion having been made to open the default, vacate judgment of foreclosure and to set aside deed and to permit the defendant, Nora Brainard, to appear in the above entitled proceeding and said motion having duly come on to be heard, now

On reading and filing the order to show cause dated October 22, 1953 made by Hon. George M. Fanelli and the affidavit of Adolph I. King sworn to October 21, 1953 and the affidavit of Edwin B. Covey, sworn to October 21, 1953, and after hearing Adolph I. King of the firm of King & Tumminelli, attorneys for said defendant, in support of said motion, and Stanley E. Anderson, attorney for the Town of Somers, in opposition thereto, and after due deliberation and the Court having filed its memorandum;

Now, on motion of Stanley E. Anderson, attorney for the Town of Somers, it is

Ordered that the motion be and the same hereby is in all respects denied, and it is further

[fol. 4] Ordered that the stay provided for in the order to show cause dated October 22, 1953 staying a sale of the property in question be and the same hereby is vacated.

Enter,

John P. Donohoe, County Judge.

IN COUNTY COURT OF WESTCHESTER COUNTY

ORDER TO SHOW CAUSE—October 22, 1953

On reading and filing the annexed affidavits of Adolph I. King and Edwin B. Covey, both duly verified the 21st day of October, 1953 and upon all the pleadings and proceedings heretofore had herein, let the Town of Somers, County of Westchester, State of New York, by its Supervisor or other duly elected official of said Town having knowledge of the facts, show cause at a Special Term of County Court to be held in and for the County of Westchester, at the County Courthouse, White Plains, New York on the 26th day of October, 1953 at the opening of court on that day, or as soon thereafter as counsel can be heard, why an order should not be made herein opening the default of Nora Brainard, an incompetent, one of the persons referred to in the "Notice of Foreclosure of Tax Liens by the Town of Somers, in Rem" as the owner of a certain parcel of improved real property shown and designated on the Tax Map of the Town of Somers as [fol. 5] Sheet 19B Block 3016 Lots 1-4, inclusive, and the judgment heretofore entered herein against the said parcel of improved real property on the 8th day of September, 1952 should not be vacated and the deed dated on or about the 24th day of October, 1952 delivered to the Town of Somers and recorded in the office of the Clerk of the County of Westchester, Land Records Division in Liber 5149 of Deeds, Page 48, should not be set aside and permitting the said Nora Brainard, an incompetent, by Edwin B. Covey, her Committee to answer or appear or otherwise move with respect to the said "Notice of Foreclosure of Tax Liens by the Town of Somers, in Rem" and for such other and further relief as to this Court may seem just and proper, and it appearing to my satisfaction that said mo-

tion should be brought on in less time than would be required under an ordinary notice of motion, service of an order upon the Supervisor or Town Clerk of the Town of Somers, Westchester County, State of New York on or before the 23rd day of October, 1953, shall be deemed sufficient; and until further order of this Court all proceedings including the proposed sale of the real property referred to herein as Sheet 19B, Block 3016 Lots 1-14, inclusive as shown and designated on the Tax Map of the Town of Somers, on the part of the Town of Somers, its duly elected officials, under the judgment heretofore entered herein on the 8th day of September, 1952, are hereby stayed.

Dated: White Plains, New York, October 22nd, 1953.

George M. Fanelli, Judge of the County Court.

[Vol. 6] IN COUNTY COURT OF WESTCHESTER COUNTY

AFFIDAVIT OF ADOLPH I. KING, READ IN SUPPORT OF MOTION

—Verified October 21, 1953

STATE OF NEW YORK,

County of Westchester, ss.:

ADOLPH I. KING, being duly sworn, deposes and says:

That I am an attorney at law, duly licensed to practice in the State of New York and am a member of King and Tumminelli, attorneys for Edwin B. Covey, Committee of the person and property of Nora Brainard and likewise attorneys for Harry B. Brainard, husband and sole surviving heir at law of the said Nora Brainard, the said Harry B. Brainard, being a non-resident of the State of New York.

That I make this affidavit in support of the application to open the default of the said Nora Brainard and to vacate the judgment entered herein on the 8th day of September, 1952 and to set aside the deed to the Town of Somers dated on or about the 24th day of October, 1952 and for such other and further relief as to this court may seem just and proper.

This proceeding, referred to as an "In Rem Foreclosure" pursuant to Sections 165, et seq of the Tax Law of the State of New York was begun by publication of the Notice of Foreclosure in the Westchester Post and The Record, publications in the vicinity of the Town of Somers and by the posting and mailing of said notices to the persons referred to on the Tax Rolls as the last owner of said [fol. 7] property. It is presumed that notice was sent to the said Nora Brainard at her last known address.

That on September 8th, 1952, judgment of foreclosure was entered herein and on or about October 24th, 1952, a deed to the property owned by the incompetent and referred to as Sheet 19B Block 3016 Lots 1-4, inclusive on the Tax Map of the Town of Somers was delivered to the Town of Somers and duly recorded.

From investigation made by me and from conversations had with the duly-elected officials of the Town of Somers, I am of the opinion that the said Nora Brainard was and has been an incompetent for more than 15 years. I have been advised that more than 2 years ago efforts were made by one of the Justices of the Peace of the Town of Somers to have her committed to Grasslands Hospital, a State Hospital for Mental Defectives, by reason of her mental condition. I have been further advised that on many occasions the State Police were called to abate the nuisances committed by the said Nora Brainard. That she had no living relatives in this State.

On October 24th, 1952 or 3 days after the delivery of the deed referred to herein, the said Nora Brainard was adjudicated as a person of unsound mind and on November 6th, 1952 was admitted to Harlem Valley Hospital.

I have been advised and the official records reveal that the said Nora Brainard was a person of means, able to meet her obligations, being the owner of 4 parcels of improved real property other than the one referred to herein, and could have complied with the Notices had she been able to comprehend the meaning thereof.

"In Rem Foreclosures" have been declared constitutional. However, the precise question as to their constitutionality, when instituted against a known incompetent has not been decided. This special proceeding

was adopted to assist a municipality in the collection of taxes with the least degree of expense. It was intended to afford the owner reasonable notice with a likelihood of actual notice to give to the owner a reasonable opportunity to protect his land. (*City of Utica v. Proite*, 178 Misc. 925). Because the proceeding is in derogation of common law, it must be strictly construed.

In the instant proceeding an application was made to have an attorney designated to investigate whether or not any person affected were engaged in the military service, to protect the interests of these persons, if any. This requirement is not set forth in the Tax Law but is set forth in Soldiers and Sailors Civil Relief Act and the Military Law of the State of New York. If these sections are referred to in these proceedings to protect the interest of those in the Armed Forces, why should not an effort be made to protect the interest of an incompetent and an application made under Section 226 of the Civil Practice Act? This incompetent, even had actual notice been given to her, could not comprehend the meaning thereof and protect her land and improvements.

I am of the opinion and verily believe that the judgment of foreclosure with respect to the property of this incompetent to be invalid and a nullity and that the statute in this respect, Sections 165 et seq is unconstitutional. True enough the statute refers to the interest of incompetents and infants in the real property, but it makes no mention as to the method of procedure. It should therefore be read in the light of other sections of the law as in the case of [fol. 9] those in the military service. Had a person been designated to accept service or in the case of an infant, a special guardian be appointed, in each case to protect the interest of the incompetent or infant, their interest could be barred and such action would then be constitutional, as notice, reasonable or actual, would have been communicated to the individual by his representative.

These sections did not intend the municipality to profit by the delinquency of the payment of taxes but was created to enforce collection. In the instant case the tax arrears, interest, penalties, foreclosure costs and cost of maintenance amounts to less than \$500.00. The minimum price

referred to in the notice of sale is \$3,500.00 or more than 7 times the delinquency. It is of interest to note that the first minimum price was fixed at \$6,500.00 or more than 13 times the delinquency. To permit this sale in the light of facts would further continue an injustice against this person.

On September 15th, 1953, I appeared at the Town Board Meeting of the Town of Somers and offered to the Town officials all of the arrears as noted herein on behalf of the incompetent and her committee in consideration of a return of the said property but my offer was refused.

I, therefore, join in the prayer of Edwin B. Covey for the relief demanded in the order to show cause and in the affidavit of Edwin B. Covey for which no previous application has been made.

Adolph E. King.

(Sworn to October 21, 1953.)

[fol. 10]—IN COUNTY COURT OF WESTCHESTER COUNTY.

AFFIDAVIT OF EDWIN B. COVEY, READ IN SUPPORT OF MOTION
—Verified October 21, 1953

STATE OF NEW YORK,
County of Westchester, ss.:

EDWIN B. COVEY, being duly sworn, deposes and says:

That I am an attorney of law, duly licensed to practice in the State of New York, and am the Committee of the person and property of Nora Brainard, an incompetent, having been appointed by order of this Court, on January 30th, 1953, by an order made and entered on that day by the Hon. Arthur D. Brennan, Judge of the County Court of the County of Westchester.

That on February 13, 1953, I caused to be filed with the County Clerk of the County of Westchester, a bond in the sum of \$3,000.00, pursuant to the provisions of the order dated January 30th, 1953, appointing me Committee of the said incompetent as set forth herein.

That I make this affidavit in support of my application.

as Committee of the person and property of Nora Brainard, an incompetent, to open the default occasioned by her in the within proceeding, vacating the judgment entered herein on the 8th day of September, 1952, and to set aside the deed delivered to the Town of Somers herein on October 24th, 1952, which deed was recorded in Liber 5149 of Deeds, page 48, in the Office of the Clerk of the County of Westchester, Division of Land Records.

Upon information and belief, the said Nora Brainard [fol. 11] was incompetent, although not adjudicated, for many years past and was known to the citizens of the Town of Somers, in which she resided, and to the officials of the Town, as a person without mental capacity to handle her affairs and unable to understand the meaning of any notices served personally upon her by mail or by publication. That the said Nora Brainard, on November 6th, 1952, was admitted to the Harlem Valley Hospital as a person of unsound mind, by an order of certification of the County Court, County of Westchester, dated October 29th, 1952. That on May 8th, 1952, this action was begun by publication of a Notice of Foreclosure of Tax Liens, by the Town of Somers, by action in rem, in the "Westchester Post" and "The Record", publications serving the area of the Town of Somers. That as appears more fully from the affidavit of Anna D. Fuchs, Receiver of Taxes of the Town of Somers, dated July 22nd, 1952, attached to the papers in the within proceeding, the said Anna D. Fuchs filed a verified list of delinquent taxes with the County Clerk of the County of Westchester, and designated the aforesaid papers for publication. That on April 30th, 1952, the said Anna D. Fuchs posted notice designated "Notice of Foreclosure of Tax Liens by the Town of Somers by Action in rem", and posted similar notices in the Post Offices of the Town of Somers, located at Somers, Lindendale and Shenorock. On April 30th, 1952, the said Anna D. Fuchs mailed a notice, together with a statement addressed "To the party to whom the enclosed notice is addressed" to each person named in the list of delinquent taxes at the last known address, as appears from the said tax liens.

[fol. 12] That upon information and belief, one of the persons to whom the said notice was mailed was the incompetent Nora Brainard.

That as appears more fully from the affidavit of Stanley E. Anderson, attorney for the Town of Somers in the within proceeding, dated July 23rd, 1952, a list was filed with the County Clerk on April 29th, 1952, and a certified copy of said list filed on the same date at his office at 15 East Main Street, Mt. Kisco, New York, and a certified copy likewise filed with Anna D. Fuchs, Receiver of Taxes of the Town of Somers. That said affidavit of Stanley E. Anderson refers to the posting of notices and publication and notice under Section 165 (b) of the Tax Law, and of the mailing of said notices.

That the said affidavit of Stanley E. Anderson then states:

"That more than twenty days have expired since the date fixed as the last date for the redemption in said notice of foreclosure, and no party or owner has filed an answer to this action",

and further states:

"The time of each and every person to appear or answer has now expired and all of the parties are now in default for want of pleading."

That by coincidence I, at that time not knowing the incompetent, Nora Brainard, nor having any knowledge regarding her, was appointed Special Guardian in the said action, by order dated July 24th, 1952, made and entered by the Hon. Arthur D. Brennan, Judge of the within Court, "to report and protect the interests of persons affected by [fol. 13] this action, having any right, title or interest in or lien upon any parcel involved herein, who are in the Military Service of the United States, pursuant to the Soldiers' and Sailors' Civil Relief Act and the Military Law of the State of New York, and any Act Amendatory thereto." That pursuant to said order I made an investigation regarding the persons named in the said tax delinquent list and determined that none of said persons were in the Military Service, and therefore consented to the entry of the judgment herein, solely upon that basis.

That subsequent thereto, I was retained by the Northern Westchester Bank, for the purpose of instituting an

action to foreclose a mortgage upon the said property owned by the incompetent, and upon investigating the same, learned of the mental capacity of the said Nora Brainard, and by reason thereof withheld proceeding with said action, knowing from my investigation that she was a person of unsound mind and unable to understand the nature of her acts or the nature of process to be served upon her. This information, which I then gained, was available to all persons in the Town of Somers, from mere investigation or conversation with the neighbors of the incompetent.

That in my report filed in the within action I noted that all of the property referred to in the said action, other than that owned by the said Nora Brainard was unimproved, although I did not know then that this was the home of the said Nora Brainard, an incompetent.

I am of the opinion and verily believe that although an in rem tax lien foreclosure is constitutional, I do not believe [fol. 14] that it was intended to be permitted where the party listed as one of the owners of the said property was known to have been incompetent and unable to understand the meaning of the notice to be published, posted and mailed to the persons named in the said tax delinquent list. I am mindful of the fact that the statute refers to the barring of any claim of an infant or incompetent, but verily believe that this provision, if intended to mean what it says, is unconstitutional, as depriving the person named of property without due process of law.

The Legislature, in granting Section 165, et seq., of the Tax Law, permitting foreclosures in rem, made certain that as much notice as possible should be given to the person, named on the tax rolls as is humanly possible, to afford the said person an opportunity to clear up the tax lien, notwithstanding the fact that the said statute was intended to enforce the collection of taxes due the municipality.

In the instant case, all notice delivered to this incompetent was a nullity, and it was impossible for her to understand the meaning of the notice published, posted and mailed to her, for her mental faculties had so receded that five days after the delivery of the deed to the Town of Somers, in the within action, said order was made and entered in this Court, committing her to the Harlem Valley Hospital.

That in the petition requesting the appointment of a Committee, it is noted that this incompetent was the owner of several parcels of land, exclusive of the parcel in question, of a value of not less than \$17,000.00, with income being derived therefrom, and that she had no relative or next of kin located within the State of New York. There was no [fol. 15] one present or available who was able to act in her behalf, to make payment to the Town for her delinquent taxes, or to clear up the tax lien defaults.

That I verily believe that the in rem provisions were not intended to take away property from a person so situated. That should this injustice remain uncorrected, this incompetent could ultimately become a public charge, subject to support and maintenance by the People of the State of New York.

That I have been advised by Adolph I. King, attorney in the within proceeding, that on September 22nd, 1953, he appeared before the Town Board of the Town of Somers, offering them the unpaid taxes, interest, penalties, foreclosure costs, attorneys fees and costs of maintenance from October 24th, 1952, to that date, in consideration for the return of a Deed to the Estate of the Incompetent. That this offer was rejected. That I verily believe and am informed that the unpaid taxes, interest, penalties, cost of foreclosure, attorneys fees and maintenance, amounts to approximately \$480.00, and that the said property was offered for sale by the Town of Somers, first with a minimum bid price of \$6500.00, and has been re-scheduled for sale on October 24th, 1953, at 10 A. M., with a minimum bid price of not less than \$3500.00. That I believe that the purpose of the in rem proceedings was not intended to permit a municipality to profit by the misfortune of an individual situated as this incompetent, and that an opportunity should be given to have the default opened, the judgment vacated and the deed set aside for the reasons set forth herein.

[fol. 16] That the reason an Order to Show Cause is sought herein, is because a sale of the said property has been scheduled for October 24th, 1953, at 10 A. M., and I seek a stay of the said sale, pending the determination herein.

That no previous application for the relief sought herein has been made before any other Court or Judge.

Wherefore, I respectfully pray that an order be made and entered herein opening the default of the incompetent, Nora Brainard, vacating the judgment entered herein on the 8th day of September, 1953, and setting aside the Deed recorded herein on or about the 24th day of October, 1952, and for such other and further relief as to this Court may seem just and proper in the premises.

Edwin B. Covey.

(Sworn to October 21, 1953.)

[fol. 17] IN COUNTY COURT OF WESTCHESTER COUNTY

OPINION BY DONOHUE, J.—December 3, 1953

Matter of foreclosure of Tax Liens pursuant to Article Seven A, Title Three of the Tax Law, by the Town of Somers, (List of Delinquent Taxes for 1953).

Motion to open default, vacate judgment of foreclosure and set aside deed and permit a defendant to appear in the above entitled in rem proceeding. The application is made by the committee of Nora Brainard, an incompetent, who prior to certification as a mental incompetent and adjudication as such, was the owner of one of the parcels of real property referred to in the above entitled proceedings. It is contended that the default of said Nora Brainard was excusable since she was a known incompetent at the time that proceedings were instituted and that by reason of her mental incapacity she did not know the nature of the proceeding and that the Court was not apprised of her condition and no one was appointed to act in her behalf. It is further contended that section 165-a of the Tax Law with respect to incompetents is unconstitutional in that the manner of giving notice to an incompetent is inadequate. In the first instance it should be pointed out that the procedure adopted by the applicant is improper. Subdivision 7, section 165-h of the Tax Law provides substantially that there is a conclusive presumption after two years from the date of the recording of the deed that the action and all proceed-

ings were regular and in accordance with the provisions of law relating thereto, and further provides "No action to set aside such deeds may be maintained unless the action is [fol. 18] commenced and a notice of pendency of the action is filed in the office of the proper County Clerk prior to the time that the presumption becomes conclusive * * *". In the case at bar no action to set aside the deed has been commenced and no lis pendens has been filed although the time that the presumption becomes conclusive has not expired. Under the provisions of subdivision 5, section 165-h of the Tax Law it is proved substantially that upon the execution of a deed all rights of infants, incompetents, &c., are barred and forever foreclosed. In *City of Utica v. Proite* (178 Misc. 925, aff'd. 288 N. Y. 477) the statute was held constitutional notwithstanding the specific argument in support of the unconstitutionality of the act that there was "no protection of the rights of infants and incompetents". Under the doctrine enunciated in *City of Utica v. Proite* (supra) it must be determined that the applicant was not deprived of her constitutional rights and that the statute is valid. Motion denied. Submit order.

[fol. 19] NEW YORK SUPREME COURT, APPELLATE DIVISION,
SECOND DEPARTMENT

[Title omitted]

STIPULATION AS TO CHANGING OF DATE OF THE FINAL ORDER
IN NOTICE OF APPEAL—February 9, 1954

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the Notice of Appeal heretofore filed in the County Court, Westchester County, be and the same hereby is corrected to change the date of the final order from December 2, 1953 to December 16, 1953.

Dated, New York, N. Y., February 9th, 1954.

King & Tumminelli, Attorneys for Petitioner-Appellant. Stanley E. Anderson, Attorney for Respondent-Respondent.

[fol. 20] IN COUNTY COURT OF WESTCHESTER COUNTY

STIPULATION WAIVING CERTIFICATION (Omitted in Printing)

[fol. 21] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, SECOND DEPARTMENT

NOTICE OF APPEAL TO COURT OF APPEALS

-[Title omitted]

Please take notice that, pursuant to leave granted by the Appellate Division, 2nd Department, in the above-entitled action, by an order duly entered on the 1st day of June, 1954, the above named Edwin B. Covey, Committee of the Person and Property of Nora Brainard, an incompetent, appellant herein; hereby appeals to the Court of Appeals from the order of affirmance herein entered in the office of the Clerk of the County of Westchester on the 30th day of April, 1954, pursuant to the order of the said Appellate Division, duly entered herein, and which order in all things by a divided Court affirmed the order of the County Court, Westchester County, entered herein on the 16th day of [fol. 22] December, 1953, and this appeal is from each and every part of said order.

Yours, etc., Adolph I. King, Attorney for Appellant,
Office & P. O. Address, 521 Fifth Avenue, New
York City, MUrray Hill 7-9050.

To: Stanley E. Anderson, Esq., Attorney for Respondent.

[fol. 23] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, SECOND DEPARTMENT

ORDER ON MOTION GRANTING LEAVE TO APPEAL TO THE COURT
OF APPEALS AND CERTIFYING QUESTION OF LAW—June 1,
1954

[Title omitted]

The above named Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, the appellant in this proceeding having made a motion for

leave to appeal to the Court of Appeals from the order of this Court, entered on the 12th day of April, 1954, made as [fol. 24] a matter of law and not in the exercise of discretion, and the motion having been duly submitted:

Now on reading and filing the papers in support of and in opposition to said motion and all the papers upon which the appeal was heard; and due deliberation having been had thereon:

It is ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be received by the Court of Appeals, to wit:

Was the order of this Court, entered April 12, 1954, properly made as a matter of law?

Enter.

John J. Callahan, Clerk.

[fol. 25] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, SECOND DEPARTMENT

ORDER OF AFFIRMANCE ON APPEAL FROM ORDER, April 12,
1954

[Title omitted]

The above named Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, petitioner, in this action having appealed to the Appellate Division of the Supreme Court from an order of the County Court of Westchester County, entered in the office of the [fol. 26] Clerk of the County of Westchester on the 16th day of December, 1953, denying the application to open the default; to vacate the judgment of foreclosure, and set aside the deed, etc., herein, and the said appeal having been argued by Mr. Angelo A. Tumminelli of Counsel for appellant, and argued by Mr. Harry H. Chambers of Counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered that the order so appealed from be and the same hereby is affirmed, without costs. Nolan, P. J., Wen-

zel, MacCrate and Beldock, JJ., concur; Adel, J., dissents and votes to reverse the order and to grant the motion, with memorandum as contained in opinion and decision slip dated April 12th, 1954, herein.

Enter:

John J. Callahan, Clerk.

[fol. 27] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, SECOND DEPARTMENT

OPINION OF APPELLATE DIVISION

Appeal by the committee of an incompetent from an order of the County Court, Westchester County, denying his motion (1) to open a default in an rem tax foreclosure brought pursuant to Article VII-A, title 3 of the Tax Law; (2) to vacate the judgment of foreclosure entered therein, and (3) to set aside the deed delivered pursuant to the judgment. Order affirmed without costs. Upon the expiration of the time prescribed by the statute (Tax Law, sec. 165, et seq.) for redemption and answer, the rights of the parties, in view of the provisions of section 165-a of the Tax Law, became fixed and unalterable. The latter section is in the nature of a statute of limitations and precludes the court from extending the time to answer or redeem therein prescribed (*City of Peekskill v. Perry*, 272 App. Div., 940; *City of N. Y. v. Jackson*, 140 Realty Corp., 279 App. Div., 668; *City of N. Y. v. Lynch*, 281 App. Div., 1038, aff'd — N. Y., —, decided March 4, 1954; *Keely v. Sanders*, 99 U. S., 441, 445-446; *Levy v. Newman*, 130 N. Y., 11, 13; *People ex. rel. Quargento v. Moynahan*, 148 App. Div., 744, 746, aff'd on opinion below, 205 N. Y. 590; *City of New Rochelle v. Echo Bay Waterfront Corp.*, 268 App. Div., 182, 191, aff'd 294 N. Y., 678, cert. denied 326 U. S. 720). Nolan, P. J., Wenzel, MacCrate and Beldock, JJ., concur.

[fol. 28] Adel, J., dissents and votes to reverse the order and to grant the motion, with the following memorandum: It appears without dispute that the taxpayer was incompetent for many years, to the knowledge of the town officials. Within a few days after the town took a deed to her

property for non-payment of taxes, the taxpayer was adjudicated incompetent and a committee of her person and property appointed. The committee promptly offered to pay the arrears, together with the costs and expenses of foreclosure, and to redeem the property. The property has not been sold by the town, and no rights of third persons are concerned. While it has been held that the provisions of the Tax Law are in the nature of a statute of limitations which preclude the court from extending the time to answer or redeem, I believe that the undisputed facts in this case call for the exercise of the equitable powers of the court by staying the town in its oppressive and unconscionable conduct. The town seeks not payment of the taxes due but profit by reason of the taxpayer's misfortune.

[fol. 29] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, SECOND DEPARTMENT

STIPULATION WAIVING CERTIFICATION OF RECORD TO COURT OF
APPEALS—September 17, 1954 (Omitted in Printing)

[fol. 30] IN COUNTY COURT OF WESTCHESTER COUNTY,

In the Matter of the Foreclosure of Tax Liens, pursuant
to Article Seven A, Title Three of the Tax Law, by the
TOWN OF SOMERS, Respondent-Appellee.

EDWIN E. COVEY, Committee of the Person and Property
of NORA BRAINARD, an Incompetent, Petitioner-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED
STATES

I. Notice is hereby given that Edwin B. Covey, Committee of the Person and Property of Nora Brainard, an Incompetent, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York

dated April 22, 1955, sustaining the validity under the Fourteenth Amendment of the United States Constitution, of Article VII-A, Title Three of the New York Tax Law and of the taking thereunder by the Town of Somers of the property involved, which final order was entered in this action on April 26, 1955, on a motion for re-argument and amendment of the Remittitur relative to the decision of the Court of Appeals rendered February 28, 1955.

This appeal is taken pursuant to 28 U.S.C., Section 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Notice of Appeal to the Supreme Court of the United States.

[fol. 31] 2. Order of the Court of Appeals dated April 21, 1955.

3. Order of the Court of Appeals dated February 28, 1955, and

4. Record on Appeal to the Court of Appeals of the State of New York.

III. The following questions are presented by this appeal:

1. Whether the taking by the Town of Somers of the property of the Incompetent, Nora Brainard, was, on the facts presented in the Record, a deprivation of due process under the Fourteenth Amendment to the United States Constitution?

2. Whether the taking by the Town of Somers of the property of the Incompetent, Nora Brainard, was, on the facts presented in the Record, a denial of equal protection of the laws all of which is prohibited and ment of the United States Constitution?

3. Whether Article VII-A, Title Three of the New York Tax Law, and its application to the owners of property, are repugnant to the United States Constitution, in that each results in a deprivation of property without due process and denies such owners equal protection of the laws, all of which is prohibited and

invalid under Section I of the Fourteenth Amendment to the United States Constitution?

Adolph I. King Dodge Building Mahopae, N.Y., and Samuel M. Sprafkin and Mandel Matthew Einhorn 521 Fifth Avenue New York 17, N.Y. Attorneys for Appellant.

[fol. 32] CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 33] IN THE COURT OF APPEALS OF NEW YORK
Remittitur—Feb. 28, 1955

[fol. 34] In the Matter of the Foreclosure of Tax Liens, pursuant to Article Seven A, Title Three, of the Tax Law, by the Town of Somers, Respondent; Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, Appellant.

Be it Remembered, That on the 24th day of November in the year of our Lord one thousand nine hundred and fifty-four, Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, the appellant—in this cause, came here unto the Court of Appeals, by Adolph I. King, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Town of Somers, the respondent—in said cause; afterwards appeared in said Court of Appeals by Stanley E. Anderson, its attorney. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 35] Therefore, it is considered that the said order be affirmed, without costs. Question certified answered in the affirmative, as aforesaid. And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains

in the said Appellate Division, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office, Albany, February 28,
1955.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 36] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

STAY ORDER—April 21, 1955

A motion having heretofore been made herein upon the part of the appellant for a stay in the above cause and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and the Town of Somers stayed from proceeding with the sale of the subject property to and including the 25th of May, 1955, to enable the appellant to apply to the Supreme Court of the United States or to a Justice thereof for a stay in connection with an application for a writ of certiorari.

Gearon Kimball, Deputy Clerk.

[fol. 37] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Adolph I. King, of counsel for the appellant—, and by Mr. Harry H. Chambers, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. Question certified answered in the affirmative. And thereafter, this court, having denied a motion for reargument and granted

a motion to amend this remittitur, did order that there be added hereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz., Whether the taking by the Town of Somers, of the property here involved, was, on this record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment. The Court of Appeals held that there was no denial of any constitutional right of the petitioner (See Matter of Town of Somers v. Covey, 308 N.Y. 798).

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

[fol. 38] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER DENYING MOTION FOR REARGUMENT AND AMENDING
REMITTITUR—April 21, 1953

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further ordered, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur, requested and when returned it will be amended by adding thereto the following:

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz., Whether the taking by the Town of Somers, of the property here involved, was, on this record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment. The Court of Appeals held that there

[fol. 39] was no denial of any constitutional right of the petitioner (See Matter of Town of Somers v. Covey, 308 N.Y. 798).

And the Supreme Court is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

(Seal)

A Copy

Gearon Kimball, Deputy Clerk.

[fol. 40] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—Nov. 7, 1955

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

November 7, 1955

(5847-9)